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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GARY MASON, Plaintiff and Respondent, v. INTERNATIONAL FIDELITY INSURANCE COMPANY, Defendant and Appellant,	B259892 (Los Angeles County Super. Ct. No. PC048679)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.

Diem Law and Robin L. Diem for Defendant and Appellant.

Mark M. O'Brien, a Law Corporation, and Mark M. O'Brien for Plaintiff and Respondent.

An underpaid heavy equipment lessor on a public works contract successfully brought suit to recover the underpayment against the general contractor's payment bond. The bond surety argues, on appeal, that it was entitled to an offset for amounts the general contractor may have overpaid in settling claims of the equipment lessor for equipment it had supplied earlier in the project, when it was working for a subcontractor who had since been terminated. We conclude that any claim of overpayment is irrelevant to the amounts due the equipment lessor for equipment it supplied directly to the general contractor, and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At issue is a public works project (project) in the City of Long Beach. The City awarded the contract to Construction EMarkets, Inc. dba Tucker Engineering (general contractor). General contractor initially subcontracted a portion of the work to Right Choice Services, Inc. (subcontractor). Subcontractor, in turn, rented heavy equipment for the project from Gary Mason, dba Iron Horse Excavator Rental (equipment lessor), the plaintiff in this case. As required by statute, the general contractor obtained a payment bond to guarantee payment for the work done and materials supplied for the project. (Civ. Code, § 9550.)[1] The surety on the bond is International Fidelity Insurance Company (surety), the defendant in this case.

When subcontractor was hired by general contractor to work on the project, subcontractor had a prior relationship with equipment lessor. Perhaps because of this, subcontractor's agreement with equipment lessor was informal. There was no writing reflecting the specific equipment to be supplied, or the rental rates to be paid. It is undisputed, however, that equipment supplier first brought some equipment to the project

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[1] The statutes governing payment bonds on public improvements have been recodified from their location at the time of the facts giving rise to this action. We cite to current authority; there is no material difference between the former statutes and current law.

site in September 2009, and that at least some of equipment lessor's machines were used by subcontractor through November 2009.

In November 2009, general contractor became dissatisfied with subcontractor's performance (or lack thereof). At general contractor's request, an administrative hearing was held, whereby general contractor obtained the City's permission to remove subcontractor from the project. The administrative decision was dated November 24, 2009. Equipment lessor believed that it was removed from the project along with subcontractor. It therefore began arranging to remove its equipment from the jobsite. At the same time, at subcontractor's request, equipment lessor created a final bill for its work on the project.

This much can be said of equipment lessor's final bill to subcontractor: (1) the bill was for a total of $61,025.16; (2) it was, admittedly, prepared in a hurry, without reference to necessary records, and contained mistakes; and (3) it included charges for standby time, although equipment lessor and subcontractor had not agreed in advance that subcontractor would be billed for standby time, and charging for standby time was not the industry practice. The trial court would ultimately conclude that the evidence "strongly suggests at least a tacit understanding between [subcontractor] and [equipment lessor] to submit inflated bills to [general contractor] for their mutual perceived benefit."

After subcontractor was kicked off the project, equipment lessor indicated to general contractor that it was eager to rent its equipment directly to general contractor, to continue the project. General contractor agreed; a pricing sheet with daily rates for various pieces of equipment was agreed upon.[2] Equipment lessor's equipment was used on the project through January 13, 2010. Record-keeping for use of equipment by general contractor was substantially better than the record-keeping for the use of

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[2] As we shall discuss, testimony at trial indicated this pricing sheet was ambiguous. The pricing sheet set forth daily rates, while the parties agreed that so-called "monthly/hourly" rates would be charged. The parties differed on how the monthly/hourly rates were to be determined from the daily rates in the pricing sheet.

equipment by subcontractor, with the result that it could be determined exactly how many hours each piece of equipment lessor's equipment was used during this period.

Although equipment lessor was providing equipment to general contractor, it was not being paid in full for the equipment used by general contractor. Only two partial payments, amounting to $9,840, were made, on a balance exceeding $30,000. Moreover, no payments were made on the outstanding balance owed equipment lessor for the equipment it had supplied subcontractor.

Equipment lessor pursued its $61,025.16 bill for the equipment it had supplied to subcontractor. In February 2010, it issued a stop notice on the project for $61,025, requiring the City to set aside sufficient funds to satisfy its claim from the payments it would make general contractor on the project. Although general contractor had no contractual obligation to pay equipment lessor for the equipment it had rented subcontractor, equipment lessor's stop notice impacted general contractor's ability to get paid on the project.[3]

General contractor therefore entered into negotiations with equipment lessor, in the hopes of settling equipment lessor's claim for equipment rentals to subcontractor, and thereby eliminate equipment lessor's stop notice. An e-mail exchange indicates that general contractor believed equipment lessor's invoices through November 2009 to be "extremely inflated." Finally, it ultimately agreed to pay equipment lessor $40,000—a reduction of approximately $21,000—in exchange for an unconditional release of claims for payment for the equipment provided subcontractor.

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[3] There is one statement in the record which suggests general contractor did, in fact, take on an obligation to pay equipment lessor for the equipment it had rented subcontractor. Subcontractor itself had issued a stop notice, in an amount exceeding $2 million, for amounts allegedly owed to itself and its own subcontractors and suppliers (including equipment lessor). On March 30, 2010, general contractor obtained a court order releasing the funds withheld by the City pursuant to subcontractor's stop notice. In a later document, prepared by general contractor, general contractor recited that the court suspended subcontractor's stop notice rights, and stated, "[general contractor] has agreed to pay subcontractors for work under [subcontractor] contract during that period." It is unclear whether general contractor "agreed to pay" subcontractor's own subcontractors as part of the procedure by which it obtained release of subcontractor's stop notice.

This settlement agreement was fully performed in April 2010. General contractor paid equipment lessor $40,000. Equipment lessor signed a "General Claim and Indemnity Release," prepared by general contractor, indicating that the payment settled all claims for equipment lessor's work for subcontractor. Equipment lessor also signed a form "Unconditional Waiver and Release Upon Progress Payment," releasing its stop notice. The waiver and release stated that it related only to equipment furnished through November 30, 2009 (the last date equipment lessor worked for subcontractor), and did not cover anything furnished after that date.

Having resolved the dispute regarding equipment rented to subcontractor, equipment lessor focused its attention on equipment rented directly to general contractor. Equipment lessor believed it was still owed in excess of $30,000 for such equipment. In June 2010, equipment lessor issued a stop notice in the amount of $33,349.94, the amount it asserted general contractor owed for the post-November 2009 equipment rentals.

On July 7, 2010, equipment lessor filed this action against surety, seeking to recover $33,350 on the payment bond surety had issued to general contractor. The complaint was based solely on the equipment rented directly to general contractor pursuant to their December 1, 2009 agreement. Equipment lessor's complaint did not refer to the equipment it had rented subcontractor; as far as equipment lessor was concerned, that had been resolved by settlement.

Surety answered and the case proceeded to a bench trial. It quickly became clear that the parties had two different views on how the case should proceed. A cause of action for recovery on a payment bond is relatively straightforward. A plaintiff need only establish: (1) it performed work on a public contract; and (2) it was not paid in full for that work. (Civ. Code, § 8154, subd. (c); see *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 564.) Equipment lessor sought to show both elements were true with respect to the equipment it supplied directly to general contractor. Surety, in contrast, argued that equipment lessor had to establish the elements with respect to its work *on the public contract taken as a whole*. In other words, surety believed that equipment lessor had to show that it was underpaid for all of the equipment

it rented during the course of the project, including the equipment it had rented subcontractor. Believing that equipment lessor had been substantially overpaid for the rentals to subcontractor, surety took the position that, considering all of equipment lessor's rentals together, and all of the payments equipment lessor had received (including the $40,000 settlement), equipment lessor had been paid in full.

The trial court requested post-trial briefs addressing this issue. Lengthy oral argument was held, in which both parties were asked to discuss whether the court could offset any overpayment for equipment rented to subcontractor against any amounts due for equipment rented to general contractor. The court took the matter under submission, and ultimately issued a statement of decision in favor of equipment lessor. The trial court concluded that, although general contractor had no legal obligation to pay anything for the equipment rented to subcontractor, it chose to do so in order to avoid the stop notice. General contractor paid the $40,000 as a settlement of a disputed claim; it believed equipment supplier's final bill to subcontractor was inflated, but agreed to compromise the claim in exchange for a release. This constituted an accord and satisfaction. The court acknowledged surety's argument that the court should consider the equipment supplied throughout the entire project and all payments made, but noted that surety "does not cite any legal authority in support of this proposition." Considering only the equipment rented to general contractor and the payments made for that equipment, the court concluded that equipment supplier was entitled to judgment in the amount of $26,911.04.

Surety filed a motion for new trial, which was denied. Equipment lessor sought its attorney's fees, pursuant to statute.[4] Surety argued that equipment lessor's requested fees were excessive. The court awarded attorney's fees in the amount of $87,150. Surety filed timely notices of appeal from the judgment and the judgment as amended to include the attorney's fee award. We consolidated the two appeals.

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[4] "In an action to enforce the liability on the bond, the court shall award the prevailing party a reasonable attorney's fee." (Civ. Code, § 9564, subd. (c).)

DISCUSSION

On appeal, surety makes three arguments: (1) the trial court erred by not looking behind the settlement to determine whether equipment lessor had been overpaid for its rentals to subcontractor, and offsetting any overpayment; (2) the trial court's calculation of damages was not supported by the record; and (3) the award of attorney's fees was excessive.

1. Surety Was Not Entitled to Offset Overpayments Made by General Contractor In Settling Equipment Lessor's Claims Against Subcontractor

"Public works payment bonds . . . provide a cumulative remedy to unpaid subcontractors on public works projects. 'Unlike private works contracts, an unpaid subcontractor on a public works project may not seek recovery from the real property. "[P]rinciples of sovereign immunity do not permit liens for persons furnishing labor or supplies on public property . . . ." [Citation.] In the place of a lien, the unpaid subcontractor may proceed against the general contractor by way of the payment bond requirements of [former] Civil Code section 3247 et seq. These statutes " 'give to materialmen and laborers who furnish material for and render services upon public works an additional means of receiving compensation.' [Citation.]" ' [Citation.]" (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co., supra,* 170 Cal.App.4th at p. 563.) Materialmen and subcontractors at any tier may maintain direct actions against sureties on public works payment bonds. (*Ibid.*)

However, the tier on which the unpaid subcontractor worked determines the scope of that subcontractor's recovery against the surety. If the unpaid subcontractor was *not* in privity with the general contractor, the correct measure of damages against the surety is "the reasonable value of the services provided, not the contract price." (*Blair Excavators, Inc. v. Paschen Contractors, Inc.* (1992) 9 Cal.App.4th 1815, 1818.) In contrast, if the unpaid subcontractor was in privity with the general contractor, the unpaid subcontractor can recover the contract price from the surety. (*John A. Artukovich Sons, Inc. v. American Fidelity Fire Ins. Co.* (1977) 72 Cal.App.3d 940, 946-947.) Thus, as applicable

to this case, in the absence of any payment to equipment lessor, equipment lessor would have two claims: (1) a claim for the unpaid reasonable value of the equipment rented to subcontractor; and (2) a claim for the unpaid contract rental price of the equipment rented to general contractor. Equipment lessor's position at trial, which was accepted by the trial court, was that, since its first claim had been resolved by settlement, the only thing at issue was its second claim; further, the terms of the settlement of the first claim were immaterial.

On appeal, surety argues that the trial court erred because, as a matter of law, the court should have considered both claims as a single claim for damages – requiring equipment lessor to prove that *all* of the payments it received did not cover the reasonable value of the equipment it had rented subcontractor plus the contract value of the equipment it had rented general contractor. Surety cites no authority for this proposition, and logic and policy concerns are against it.[5] First, we are guided by the statutory requirement that a payment bond "shall be construed most strongly against the surety and in favor of all persons for whose benefit the bond is given." (Civ. Code, § 8154, subd. (a).) Second, although surety issued a single payment bond on the entire project, there were two separate contracts at issue as far as general contractor and equipment lessor were concerned – equipment lessor's oral agreement with subcontractor

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[5] Surety relies only on *Bonded Products Co. v. R. C. Gallyon Constr. Co.* (1964) 228 Cal.App.2d 186. The *Bonded Products* case involved an unpaid sub-subcontractor on a public works contract. In that case, at the request of the subcontractor, the sub-subcontractor executed a waiver of lien, releasing all of its liens on the project and acknowledging receipt of the $1,943 due it. The general contractor paid the subcontractor the $1,943, but the subcontractor did not pay that money to its sub-subcontractor. (*Id*. at p. 188.) When the sub-subcontractor sued the surety on the general contractor's payment bond, the surety sought to rely on the sub-subcontractor's release, on the theory that the sub-subcontractor was estopped by the release to assert that it had not been paid the $1,943. The court disagreed, holding that the presence or absence of a release from the sub-subcontractor was inconsequential to the liability of the surety on the bond. (*Id*. at p. 190.) We fail to see any relevance of *Bonded Products* to the present case. We are not here concerned with a surety attempting to hold a sub-subcontractor to the language of a release it signed under false pretenses, but a surety arguing that a payment made pursuant to a release should be reallocated.

and equipment lessor's subsequent agreement (incorporating written rates) with general contractor. The settlement between general contractor and equipment lessor regarding equipment lessor's claim arising from the first contract should have no effect on the amount surety must pay equipment lessor due to general contractor's breach of the second contract. (Cf. *Hammond Lumber Co. v. Richardson Building & Engineering Co.* (1930) 209 Cal. 82, 91 ["It seems too clear for argument that the sureties on one contract are not entitled to a reduction of their liability on account of partial payments made to their creditor on another contract."].) Third, the settlement cost surety nothing. It would be a different matter if general contractor and equipment lessor had collusively agreed that equipment lessor's claim for the equipment rented by subcontractor had a value of $40,000, and left it for surety to pay that amount. Instead, general contractor paid in full to settle that claim, leaving surety with absolutely no obligation to pay any amount with respect to the equipment rented by subcontractor. Whether general contractor paid $4,000, $40,000, or $400,000 to resolve the claim should make no difference to surety; from surety's point of view, that claim has been resolved and surety has no liability on it. Fourth, the settlement was an arm's-length negotiated agreement to resolve a disputed claim.[6] General contractor believed the amount equipment lessor sought for this claim to be overstated, but it nonetheless chose to settle the claim for less than 2/3 of the amount sought (with no interest). Surety seeks to undermine this settlement agreement, giving itself credit for every dollar general contractor paid over the reasonable value of the equipment rented to subcontractor. If surety is permitted to do this, it will defeat the policy in favor of settlements of disputed claims – no sub-subcontractor would be willing to negotiate anything less than a full and final settlement of all claims with a general contractor, as the settlement would always be open to attack by a surety if the general contractor (or an intermediate subcontractor) subsequently chose not to pay the sub-

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6 Surety argues that the $40,000 settlement did not meet the legal requirements of an accord and satisfaction, arguing, for example, that a valid accord and satisfaction must be between the same parties as those who made the initial agreement. Whether the settlement constitutes an accord and satisfaction is beside the point; what matters is that the settlement was a negotiated agreement resolving a disputed claim.

subcontractor's later bills. Fifth, as a procedural matter, the settlement agreement has not been properly challenged. That is to say, general contractor never sought to rescind it. In closing argument to the trial court, surety suggested that it could have asserted fraud in the inducement as a basis to rescind the settlement agreement, but surety never pleaded this in its answer, nor did it offer any legal basis by which a surety could rescind a fully-performed contract entered into by its insured. For all of these reasons, we conclude that surety has failed to sustain its burden to affirmatively demonstrate error on appeal. (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 913.)

2. The Damage Calculation Is Supported By Substantial Evidence

Surety next argues that the trial court awarded excessive damages. Surety does not challenge the hours the court found each piece of rental equipment was used. Instead, surety questions the calculation of the hourly rate charged for each piece of equipment. To address this argument, we must discuss the concept of a monthly/hourly rate.

Equipment lessor agreed, at trial, that its equipment was rented to general contractor on a monthly/hourly basis. What this means is that the equipment was rented at an hourly rate, but the hourly rate was established as a set fraction (1/160th) of a discounted monthly rate. Specifically, if a piece of equipment was used for four days in a calendar week, the fifth day was free. If the equipment was used for three weeks in a month, the fourth week was free. By that method, a monthly/hourly rate can be calculated from a daily rate as follows: (1) multiply the daily rate by 4 to get the weekly rate; (2) multiply the weekly rate by 3 to get the monthly rate; and (3) divide the resulting monthly rate by 160 (the allowable working hours in a month). It was a common practice in 2009 for equipment suppliers to bill for the hours their equipment was used on a monthly/hourly rate.

The ambiguity which arose at trial was this: when equipment lessor agreed to rent equipment to general contractor, equipment lessor was shown a document, Exhibit 2, setting forth daily rates for equipment to be used on the job. Equipment lessor agreed to charge those rates. However, it was not clear whether the daily rates on Exhibit 2

consisted of daily rates from which the monthly/hourly rate had to be calculated, or if, instead, they consisted of rates which already incorporated the monthly/hourly calculation.[7] For example, Exhibit 2 indicates one piece of equipment, a 370 Excavator, had a unit price of $585 per day. If that is considered a base price, it would translate into a $2,340 weekly rate (4 x $585), a $7,020 monthly rate (3 x $2,340), and a $43.88 monthly/hourly rate ($7,020/160). Using a $43.88 monthly/hourly rate, an 8-hour day would be charged at $351.04. So, should a day's rental of the 370 Excavator be charged at $351.04 or $585? Exhibit 2 indicated that the 370 Excavator was to be used for 6 days, and calculated a total for that period of $3,510 – a total which suggests that $585 was the daily rate to be used (and that it therefore already incorporated any monthly/hourly discount).

At trial, surety introduced into evidence a demonstrative exhibit, prepared by general contractor, which set forth general contractor's calculation of the rental values for all equipment lessor's rentals for the project.[8] That exhibit used a monthly/hourly rate which was something of a compromise between the two extremes discussed above. It assumed the daily rate in Exhibit 2 already incorporated a weekly rate discount, but not the monthly rate discount. In other words, using the example of the 370 Excavator, general contractor took the daily rate of $585, multiplied by 5 (instead of 4, as discounted) to get a weekly rate of $2,925. From there, general contractor correctly multiplied by 3 to get a monthly rate of $8,775, and divided by 160 to get a monthly/hourly rate of $54.84. This resulted in a cost of $438.72 for a full day's rental – something between the extremes of $351.04 and $585. General contractor's CEO testified that, in preparing the exhibit, he assumed that the daily rate in Exhibit 2 already

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[7] Not surprisingly, equipment lessor testified that the monthly discount "was built in to the daily or hourly rate."

[8] The title of the document indicates that it was *surety*'s calculation of the value of the rentals. It was not; general contractor had prepared the document for surety's use at trial.

included the free day for each week; he did not know that to be true, but made the assumption anyway.[9] Moreover, with respect to two pieces of equipment (a shear and a pulverizer) general contractor simply used the daily rate as set forth in Exhibit 2, without calculating a further discounted rate at all.

On appeal, surety argues the trial court erred by using the hourly rates in surety's own demonstrative exhibit, rather than calculating fully discounted monthly/hourly rates from the daily rates in Exhibit 2, for each and every piece of equipment rented. It is apparent, however, that the rates used by the trial court were supported by substantial evidence. "When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) Here, the witnesses agreed that monthly/hourly rates should be used, but disagreed as to whether the rates in Exhibit 2 already incorporated the monthly/hourly rate discount. General contractor prepared a demonstrative exhibit using a compromise rate. The court's use of that same compromise rate was supported by general contractor's testimony and the demonstrative exhibit itself.

3. The Attorney's Fee Award Was Not Excessive

Trial courts have broad discretion in determining the amount of a reasonable attorney's fee award. (*Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 452.) On appeal, surety challenges the trial court's calculation of a reasonable attorney's fee in only one respect: surety argues that the court should have denied *all* fees incurred after January 2011 because the case should have settled between November 2010 and January 2011 for $30,000, seeing as equipment lessor obtained a judgment for less than that amount ($26,911.04) after trial. Thus, the argument goes, all attorney's fees incurred after January 2011 provided no benefit to equipment lessor.

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9 The employee of general contractor who had prepared Exhibit 2 was not called to testify at trial.

In its opposition to equipment lessor's attorney's fee motion, surety submitted a declaration of counsel setting forth the following facts. On November 16, 2010, counsel for surety "discussed with [equipment lessor's counsel] the possibility of the parties settling" for $30,015, in exchange for a waiver of attorney's fees and interest. Counsel for surety asked counsel for equipment lessor to make a formal counter-offer in that range. On November 18, 2010, plaintiff's counsel sent an e-mail offering to settle for $41,115, including amounts for interest and attorney's fees. Counsel for surety "understood this counter-offer to mean that [equipment lessor] was not interested in compromising his claim." In January 2011, counsel for surety "conveyed a formal offer . . . to settle the matter for $22,500." This offer was rejected, although equipment lessor again indicated a willingness to settle for $41,115.[10]

We reject surety's contention on appeal that the court abused its discretion in awarding attorney fees for the period after January 2011. Although one court has held that a court may, in fact, consider informal settlement offers in setting the amount of a fee award (*Meister v. Regents of University of California, supra*, 67 Cal.App.4th at p. 453), another court has rejected the idea that such offers can be considered at all (*Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 425-426). We need not take a position on the dispute. Even if we agree that a trial court *may* consider informal settlement offers, there is no authority that a trial court *must* do so. Moreover, assuming we concluded trial courts *should* consider informal settlement offers, the evidence of settlement offers in this case does not require a reduction in the fee award. In November 2010, the parties *discussed* a possible settlement in the range of $30,015. There is no evidence surety *actually made* an offer in that amount; instead, surety's counsel had asked equipment lessor to prepare an offer "in that range," with no indication that such an offer would be accepted by surety. Surety did not actually make an offer until January 2011, and when it did, the offer was for $22,500. By this time, equipment lessor's counsel had incurred more than $7,000 in attorney's fees. Clearly, a settlement offer in

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10 There was no formal offer under Code of Civil Procedure section 998.

the amount of $22,500 is less than equipment lessor's trial recovery of $26,911.04, particularly when equipment lessor also would have been entitled to approximately $7,000 in reasonable attorney's fees. Thus, the attorney's fees incurred after equipment lessor's rejection of the offer did, in fact, obtain a greater recovery for equipment lessor than the rejected settlement offer. The court did not abuse its discretion in awarding attorney's fees for the entire litigation.

DISPOSITION

The judgment and post-judgment attorney's fee order are affirmed. Equipment lessor shall recover its costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.